(86) (3)

No. 07-749

FILED
FEB 15 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CHARLES W. WALKER, SR.,
Petitioner,

–against–

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

ALAN M. DERSHOWITZ *
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-2187
* COUNSEL OF RECORD

AMY ADELSON
NATHAN Z. DERSHOWITZ
DERSHOWITZ, EIGER
& ADELSON, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001
(212) 889-4009
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. THIS COURT SHOULD DECIDE THE IMPORTANT CONSTITUTIONAL QUESTION OF WHAT STANDARDS APPLY TO THE GOVERNMENT'S CHALLENGE TO A DEFENDANT'S EXERCISE OF PEREMPTORY STRIKES 2

1. The Standard of Review Question 3

2. The Question of Whether White Males Constitute a Cognizable Group 5

3. The Question of Mixed-Motives 7

4. The Question of the Remedy 8

II. THIS CASE PRESENTS AN OPPORTUNITY TO RESOLVE THE CONFLICT IN THE LOWER COURTS OVER THE PROPER INTERPRETATION OF THE "HONEST SERVICES" STATUTE 9

III. PETITIONER WITHDRAWS HIS REQUEST FOR REVIEW OF HIS SENTENCE 11

CONCLUSION 12

CERTIFICATE OF COMPLIANCE 13

TABLE OF AUTHORITIES

CASES

Gall v. United States,
128 S. Ct. 586 (2007) 11

Kimbrough v. United States,
128 S. Ct. 558 2007) 11

Georgia v. McCollum,
505 U.S. 42 (1982) 1

Miller-El v. Cockrell,
537 U.S. 322 (2003) 3

Miller-El v. Dretke,
545 U.S. 231 (2005) 3

People v. Luciano,
9 N.Y.2d 962, 848 N.Y.S.2d 31,
878 N.E.2d 615 (2007), review granted to
44 A.D.3d 123, 840 N.Y.S.2d 589 (1st Dept. 2007) .. 9

Snyder v. Louisiana,
No. 06-10119 (Oct. Term 2007) 3, 5

United States v. Urciuoli,
___ F3d. ___, 2008 WL 162474 (1st Cir. 2008) 10

STATUTES

18 U.S.C.,
§ 1346 9

ARGUMENT

The government ignores the historical context in which the peremptory challenge issue arose: namely, the government's successful effort, before the trial began, to decrease the number of African-Americans in the jury pool through its motion to expand the jury pool to all the divisions within the District, but exclude the racially diverse Augusta Division. The government also ignores the fact that, by skewing the jury pool, and by then striking two African-American female jurors and replacing them with white male jurors, the government obtained a racially unbalanced jury. Finally, the government ignores the very different considerations that are involved in a governmental challenge to a criminal defendant's exercise of peremptories.

After all, it is only the defendant who has a *constitutional* right to counsel and to a jury trial. Thus, in essence, this Petition asks this Court to revisit for the first time since it was decided the principles announced in Georgia v. McCollum, 505 U.S. 42 (1992), and decide whether the constitutional rights of a criminal defendant require stricter scrutiny of a trial court's decision to void a defendant's exercise of race-neutral peremptory challenges, and whether those constitutional constraints also limit the remedies available to the court if it determines that the defense improperly exercised its peremptory challenges.

In addition, and as part of this inquiry, the Court should determine the standard of appellate review to decide whether an appellate court *must* defer to the findings of a district court regarding whether defense

counsel has truthfully stated the reasons for challenging particular jurors when those reasons are race-neutral and rational, and there is no evidence in the record to support a conclusion that counsel is lying.

I. THIS COURT SHOULD DECIDE THE IMPORTANT CONSTITUTIONAL QUESTION OF WHAT STANDARDS APPLY TO THE GOVERNMENT'S CHALLENGE TO A DEFENDANT'S EXERCISE OF PEREMPTORY STRIKES

Notably, throughout its Opposition, the government *never* argues that the district court correctly held that defense counsel's justifications for the exercise of the four peremptory challenges at issue were pretextual. Nor does the government acknowledge that *it* had the burden of proving that the reasons provided for the exercise of the defense peremptories were pretextual, and that even the Eleventh Circuit concluded that the government had failed to meet its burden. The government appears to accept that the decision was wrong, but echoes the Court of Appeals, which, though it deferred to the lower court's ruling, obviously disagreed with it:

> We find it difficult to conclude that the government satisfied is burden of showing that these four strikes were pretextual, when similar evidence was rejected for the other strikes.
>
> **********
>
> Thus, while we are troubled by the weakness of record evidence in support of

> these four *Batson* challenges, especially as compared to other strikes, we are constrained to defer to the district court's findings on the genuineness of these reasons and, correspondingly, on the likelihood of purposeful discrimination.

(App. 15-16)

The government is strenuously trying to avoid further review of decisions that are indefensible. Review should be granted, however, not only because the issues relating to the exercise of peremptory challenges by a minority defendant are so critical to a fair and impartial jury trial, but also because the question of whether deference is owed to a plainly wrong decision is also of the utmost importance.

1. The Standard of Review Question

The government's opposition boils down to a single argument: this Court should not review this case because the issues are fact-based. This Court has not hesitated to review cases raising Batson issues that involved far more complex and detailed inquiry into the facts than this one. See Miller-El v. Dretke, 545 U.S. 231 (2005); Miller-El v. Cockrell, 537 U.S. 322 (2003); Snyder v. Louisiana, No. 06-10119 (Oct. Term. 2007). Moreover, the issue posed here is not purely factual. Rather, it is an important and recurring legal question -- what is the standard of appellate review when a district court decides, without support in the record, that a defendant's race-neutral reasons for exercising

peremptories are not "genuine."[1]

Unquestionably, there is always a factual component to the lower court's determination that the race-neutral reasons proffered by the defense are not legitimate. But the issue before this Court is whether, in a criminal case, the appellate court is *"constrained"* to defer to the district court, provided the lower court articulates the proper legal standard, even if, as here, the appellate court believes that the defense has satisfied the requirement of showing race-neutral reasons for the strike and the government has not met its burden of showing that those reasons are pretextual. Put another way, if the district court is wrong, and the appeals court recognizes that it is wrong, must the appeals court nonetheless "defer" to the district court's supposedly factual findings on the "genuineness" of counsel's reasoning, even when the lower court has pointed to no evidence in the record to show that counsel was primarily motivated by racial concerns.

The charge that defense counsel's reasons for exercising a peremptory strike are not "genuine" is akin to concluding that defense counsel is lying – an ethical breach. Such a charge should not be made on a whim but must be based on solid record evidence that compels the conclusion that the reasons defense counsel has articulated are pretextual.

---

[1] Though Petitioner uses the term" race neutral" to describe the third step of the Batson test, as argued below, the decision to strike the defendant's exercise of four peremptory challenges was not based on race alone, but rather involved a decision to strike white males. The defense did not strike any white females.

As argued in the Petition, this is an exceptionally important question in the context of a criminal case. Defense counsel, through the exercise of peremptory challenges, not only tries to secure an impartial and fair jury, he also seeks jurors that he believes will look favorably on the defense case. That is what peremptory challenges are for. But defense counsel's judgment is based on intuition and experience. Absent compelling evidence that an improper reason – race or gender – dominated defense counsel's thought-processes, defense counsel should not be hamstrung in his efforts, compelled by the Constitution, which affords the defendant the right to effective representation of counsel, to secure for the defendant a jury most likely to view the defendant's case fairly and without bias.

Finally, contrary to the government's footnote (Govt. Opp. at 10 n.4), the standard of appellate review *is* before this Court this term in Snyder v. Louisiana, (No. 06-10119), which was argued on December 4, 2007. This Court should hold this Petition until Snyder is decided because its resolution very well may impact on the decision in this case.

2. The Question of Whether White Males Constitute A Cognizable Group

The government perpetuates a misreading of the record below. After the extensive jury voir dire and argument over the exercise of peremptories, the government challenged the defendant's "striking of *white males* from a jury panel." (Tr. 5/23/05 at 255) The district court found "troubling" the defense challenge to the "presence of *white males* on this jury." (Tr. 5/23/05 at 278) Indeed, the court emphasized that the defense had eliminated only "*white male* jurors." Id. The

emphasis on "white males" was compelled by the record. The defense had not struck any white females and the one juror who purportedly was comparable to AH and JM, and therefore was relied on to find that the defense reasons for striking two white males was pretextual, was, as even the prosecutor asserted, a *white female.* (App. 46) (Tr. 5/23/05 at 268)

Later, in its written opinion, the district court repeatedly referred to "*white males.*" (App. 38, 44) Indeed, on appeal, the government noted in its Brief that the court had concluded that Petitioner had discriminated against the four jurors based on "race and gender." (Govt. Brief at 13) In the district court's opinion, rendered a week after the Batson hearing, at one point it mentioned discrimination on the basis of race only. (App. 46) The Court of Appeals, apparently anxious to avoid the thorny question of whether "white males" constituted a protected class, seized on this reference and decided that the court below relied on race alone. (App. 12) The government therefore argues that this case is an "inappropriate vehicle" for deciding whether white males constitute a cognizable class. (Govt. Opp. at 11)

This Court should not continue this charade. Without question, the issue presented below was the defense challenge to "white males" and thus the issue of whether "white males" (hardly a class who has suffered historic discrimination) constitute a cognizable class for purposes of evaluating whether a *juror's* right to Equal Protection has been violated is squarely before this Court. This is a question this Court has not addressed, about which there is conflict, and which, particularly in the context of a reverse-Batson challenge, warrants this Court's attention.

3. The Question of Mixed-Motives

Again the government argues that this case is an "inappropriate vehicle" for deciding whether the third part of the Batson test is satisfied if the defense articulates a race-neutral reason for exercising a strike, and that reason is not pretextual, even if race played some limited part in the decision. (Govt. Opp. at 12) The government argues, wrongly, that the defense did not raise this issue below. Not true. Co-counsel for Petitioner, on behalf of all the defendants, expressly raised the issue of "mixed motive" in its Batson argument to the district court, stating to the court that "if you were to find that the strikes were motivated by two factors one of which is impermissible just because there is a dual motivation does make it impermissible." (Tr. 3/23/05 at 274)

In the Court of Appeals, Petitioner clearly argued that, even if he had a so-called "mixed motive," and race played some part in the decision, the government had not met its burden of proof. (Appellant's Brief at 44) Indeed, in his Petition for Rehearing En Banc, Petitioner raised the mixed-motive issue as a separate issue of law worthy of *en banc* review. (Appellant's Petition for Rehearing, Point II) In any event, if as here, the defense raises legitimate non-racial grounds for rejecting a juror, but the court believes for some reason that race has played a part in the decision, the issue of dual motive is necessarily raised and the district court, before finding that the government has met its burden of proving pretext, must address the issue.

Though the Eleventh Circuit skirted this issue – plainly raised in the Briefs – it is an issue that was fully

preserved and is important for this Court to consider. As noted in the Petition, there is a conflict in the case law, both federal and state, on whether purposeful discrimination has been shown when race has been considered but it is not the primary reason for the challenge. If defense counsel, as in this case, believes that a juror would be harmful to the defense because, as in this case, he has accounting experience or is a local politician, the fact that defense counsel may also suspect that the juror's race would impede his ability to be utterly fair and impartial should not "trump" his non-racial reasons for exercising a strike. Since there is rarely a single, clear-cut reason for a peremptory challenge, the issue of mixed-motives is recurring, significant, and properly preserved in this case.

4. The Question of the Remedy

Again, the government does not address the serious conflict among the lower courts concerning the proper remedy when there is a determination of a reverse-Batson violation. Nor does it address whether the remedy chosen here, which deprived the defendant of four of his peremptory strikes, and resulted in a racially unbalanced jury, was consistent with the defendant's constitutional rights. Instead, the government argues that the issue is not properly preserved or is too fact-based to merit this Court's review. (Govt. Opp. at 12-13) The government, again, is wrong.

Defense counsel vigorously opposed the district court's decision to reseat the four challenged jurors, strike the two African-American females who were already seated, and then deprive the defense of any additional peremptories. (Tr. 5/23/05 at 283; 5/24/05 at

9-13) The propriety of this procedure was raised by defendant on his appeal, and addressed by the Eleventh Circuit. (App. 17-19) Clearly, the issue is properly before this Court.

Nor is this a fact-based question inappropriate for this Court's review. The district court for no reason other than to avoid the inconvenience of bringing in new jurors chose a remedy that resulted in the removal of two African-American jurors, a racially imbalanced jury, and the elimination of four critical defense peremptories. As demonstrated in the Petition, the question of how to remedy a successful reverse-Batson challenge is an issue about which the courts have disagreed. Indeed, just recently, the New York Court of Appeals has agreed to review a decision holding that the remedy used in this case was impermissible. People v. Luciano, 9 N.Y.3d 962, 848 N.Y.S.2d 31, 878 N.E.2d 615 (2007), review granted to 44 A.D.3d 123, 840 N.Y.S.2d 589 (1st Dept. 2007).

This Court should address the unresolved and problematic issue as to what remedies in a reverse-Batson situation accord with a defendant's due process and fair trial rights.

II. THIS CASE PRESENTS AN OPPORTUNITY TO RESOLVE THE CONFLICT IN THE LOWER COURTS OVER THE PROPER INTERPRETATION OF THE "HONEST SERVICES" STATUTE

The government misconstrues Petitioner's argument about why this case raises an issue about the amorphous and constantly shifting standards that govern a conviction for fraud under 18 U.S.C. §1346 –

the "honest services" statute. Petitioner is not, at least at this point, advocating for a particular interpretation of the statute, as the government suggests. Rather, the problem which requires this Court's intervention is that there are so many formulations of what is necessary to prove an honest services fraud, and so many ways in which the statute can be violated, the statute, as in this case, becomes an invitation for politically-motivated prosecutions.

The government attempts to play down the dissatisfaction expressed by the lower courts over the statute's imprecision. Yet, only recently, in United States v. Urciuoli, ___ F.3d ___, 2008 WL 162476 (1st Cir. 2008), the First Circuit, in finding that certain conduct *did* violate the "honest services statute, while other conduct *did not*, reiterated those concerns:

> The central problem is that the concept of "honest services" is vague and undefined by the statute. So, as one moves beyond core misconduct covered by the statute (e.g., taking a bribe for a legislative vote), difficult questions arise in giving coherent content to the phrase through judicial glosses. Closely related concerns are assuring fair notice to those governed by the statute.... and cabining the statute-a serious crime with severe penalties -lest it embrace every kind of legal or ethical abuse remotely connected to the holding of a governmental position.

2008 WL 162476 *3 (citations omitted).

Here, there was no proof of bribery. Though the government dubs the conduct "bribery-like" – a phrase itself fraught with ambiguity – in fact, contrary to the government's allegations in its Statement, there was no evidence that Petitioner ever accepted money or other benefits in exchange for legislative action. The core of the government's case dealt with alleged non-disclosure of Petitioner's interests in various entities, not the exchange of benefits for official action.

Problems with the "honest services" statute continue to plague the courts. This case, with its political overtones, highlights those problems and presents a perfect opportunity for this Court to finally determine what conduct is prohibited by the statute and whether the statute is so vague it cannot withstand constitutional scrutiny.

III. PETITIONER WITHDRAWS HIS REQUEST FOR REVIEW OF HIS SENTENCE

At the time of the initial Petition, this Court had not yet decided Gall v. United States, 128 S. Ct. 586 (2007), and Kimbrough v. United States, 128 S. Ct. 558 (2007). In light of the resolution of those cases, Petitioner withdraws his request that the Court hold this Petition, and withdraws any request for review of his sentence.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully,

Alan M. Dershowitz *
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-2187
* COUNSEL OF RECORD

Amy Adelson
Nathan Z. Dershowitz
Dershowitz, Eiger & Adelson, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001
(212) 889-4009

Dated: February 15, 2008

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2,733 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February , 2008.

Amy Adelson
Dershowitz, Eiger & Adelson, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001
(212) 889-4009

Attorneys for Petitioner
Charles W. Walker, Sr.